EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

87-1007

No. 87—

Supreme Court, U.S.
FILED
NOV 27 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1987

JAMES M. PICOZZI,

Petitioner,

against

TERRANCE SANDALOW,
individually and in his official capacity as
Dean of the University of Michigan Law School,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

James M. Picozzi
Pro Se
One New York Plaza
New York, New York 10004
(212) 820-8000

November, 1987

QUESTIONS PRESENTED

1. May the dean of a public law school suspend a student for an indefinite period, on disciplinary grounds, without ever charging the student with an offense, identifying any evidence against the student, or specifying the nature of any hearing to be offered to the student?

2. Whether the dean of a public law school may give a student, facing permanent expulsion, a choice only between inadequate procedure or waiving his protected interest in his education -- or whether the dean withholds

constitutionally adequate procedure at his own peril?

3. Where a student suspended from a public law school receives due process only by bringing a suit under 42 U.S.C. § 1983, and where the procedures won lead to his exoneration, is the student a "prevailing party" entitled to attorney's fees under 42 U.S.C. § 1988?

TABLE OF CONTENTS

	PAGE
Table of Authorities.....	vi
Opinions Below.....	x
Jurisdiction.....	x
Constitutional and Statutory Provisions.....	xi
Statement.....	1
Reasons for Granting the Writ....	32
Responsibility for Notice.....	33
What Kind of Hearing.....	43
Prevailing Party.....	53
Conclusion.....	59

APPENDIX INDEX

PAGE APP.

Opinions

Opinion of the United States District Court for the Eastern District of Michigan in Picozzi v. Sandalow, 623 F.Supp. 1571 (January 2, 1986)..... 1

Opinion of the United States Court of Appeals for the Sixth Circuit in Picozzi v. Sandalow, No. 86-1136 (August 28, 1987)..... 48

Letter from Respondent Sandalow to Petitioner Picozzi Dated May 13, 1983..... 50

Letter of Good Standing Dated August 23, 1985..... 52

Transcripts
Excerpts from Preliminary Injunction Hearing, August 30, 1984..... 53

APPENDIX INDEX

PAGE APP.

Opinions

Excerpt from Preliminary Injunction Hearing, August 31, 1984..... 59

Excerpt from Summary Judgment Hearing, November 21, 1984.... 62

TABLE OF AUTHORITIES

PAGE

Cases

Bleiker v. Board of Trustees of Ohio State University College of Veterinary Medicine, 485 F.Supp. 1381 (D.Ohio 1981)..... 50

Crook v. Baker, 584 F.Supp. 153 (E.D. Mich. 1984), rev'd 813 F.2d 88 (6th Cir. 1987).... 49

Dixon v. Alabama State Bd. of Educ., 294 F.2d 150 (5th Cir.), *cert. denied* 368 U.S. 930 (1961)..... 34, 43

Ewing v. Board of Regents of the University of Michigan, 742 F.2d 913 (6th Cir. 1984), rev'd, 474 U.S. 214 (1985)..... 33

Gabrilowitz v. Newman, 582 F.2d 100 (1st Cir. 1979)..... 49

Gaspar v. Bruton, 513 F.2d 843 (10th Cir. 1975)..... 33

TABLE OF AUTHORITIES

PAGE

Gorman v. University of Rhode Island, 646 F.Supp. 799 (D.R.I. 1986)..... 49

Goss v. Lopez, 419 U.S. 565 (1975)..... 34, 35, 43, 44,

Hall v. Medical College of Ohio at Toledo, 742 F.2d 299 (6th Cir. 1984), *cert. denied*, 469 U.S. 1113..... 49

Hart v. Ferris State College, 557 F.Supp. 1379 (W.D. Mich. 1983)..... 50

Jaksa v. Regents of the University of Michigan, 597 F.Supp. 1245 (E.D. Mich. 1984)..... 49

Jones v. Board of Governors of University of North Carolina, 704 F.2d 713 (4th Cir. 1979)..... 49

TABLE OF AUTHORITIES

PAGE

Kentucky v. Graham, 473 U.S. 159 (1985)..... 54

Maher v. Gagne, 448 U.S. 122 (1980)..... 55

Mullane v. Central Hanover Trust Company, 339 U.S. 306 (1950)..... 35

Nash v. Auburn University, 812 F.2d 655 (11th Cir. 1987)..... 49

Northcross v. Board of Ed., 611 F.2d 624 (6th Cir. 1979), *cert. denied*, 447 U.S. 911 (1980)..... 54

Smith v. Robinson, 468 U.S. 992 (1984)..... 54

TABLE OF AUTHORITIES

PAGE

Constitution and Statutes:

U.S. Const. Amend. XIV, § 1..... 41

42 U.S.C. § 1983..... 1

42 U.S.C. § 1988..... 53

Law Review:

Golden, *Procedural Due Process for Students at Public Colleges and Universities*, 11 J.L. & Educ. 337 (1982)..... 48

Note, *University Disciplinary Process: What's Fair, What's Due, and What You Don't Get*, 96 Yale L. J. 2131 (1987)..... 39, 50

Opinions Below

The opinion of the Court of Appeals (App. 48) is reported at 827 F.2d 770 (6th Cir. 1987). The District Court's opinion is reported at 623 F.Supp. 1571 (E.D. Mich. 1986). (App 1.)

Jurisdiction

The judgment of the Court of Appeals was entered on August 28, 1987. (App. 48). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions Involved

1. The Due Process Clause of the Fourteenth Amendment provides the following:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life,
>
> liberty or property, without due process of law . . .

U.S. Const. Amend. XIV, § 1.

2. 42 U.S.C. § 1983 provides the following:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

3. 42 U.S.C. § 1988 provides the following:

> In any action or proceeding to enforce a provision of [section] . . . 1983 . . . of this title, . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

STATEMENT

This Petition arises from a civil action brought under 42 U.S.C. § 1983 by Petitioner James M. Picozzi ("Picozzi") against Respondent Terrance Sandalow ("Sandalow"), both individually and in his official capacity as Dean of the University of Michigan Law School. It maintains that, subsequent to a fire in the University of Michigan ("U-M") Law School dormitory on March 8, 1983, Sandalow suspended Picozzi without even minimal due process under the 14th Amendment. Specifically, having suspended Picozzi, Sandalow did not then move ahead to charge Picozzi with an offense, identify any evidence purporting to inculpate Picozzi, or specify what procedure was available to Picozzi. When a two-week Disciplinary Hearing was finally held two years after

the fire, in February and March of 1985, Picozzi was exonerated from any wrongdoing. The facts surrounding the fire, as recited below, are as established at the Disciplinary Hearing.

In the spring of 1983, Picozzi was a second-year student at the U-M Law School, who had, by all accounts, adopted a low profile. Indeed, the Hearing Officer's opinion from the Disciplinary Hearing highlights that Picozzi was "behaving normally." In contrast, the Hearing Officer observed that other students at the Law School "were engaged in very immature conduct."

In late January 1983, a law student named Thomas Good started a rumor that Picozzi had a handgun, which he kept in

his dormitory room.[1] That rumor was picked up by a second student, Ned Miltonberg, who lodged a complaint about the gun with Susan Eklund, Assistant Dean of the U-M Law School. Thomas Good subsequently filed a similar complaint.

On February 4, 1983, law dorm Director Diane Nafranowicz summoned Picozzi to her office and stated that she had received complaints about the alleged gun. In order to coax Picozzi into giving permission for a search of his room by U-M security officers, Nafranowicz not only fabricated a story about the source of her information, but also threatened that the room would be searched even absent consent. Picozzi,

---

1. The Hearing Officer also specifically stated he did not believe Picozzi had a handgun in his room.

however, consented without hesitation. A search was conducted by Nafranowicz and a U-M security officer, but they discovered neither a gun nor other contraband.

Picozzi later approached Assistant Dean Eklund, seeking both an explanation for the search and guidance as to the proper channels for registering his own complaint about what had occurred. Eklund denied knowing either the source of the complaints or who had ordered the room search. Additionally, she attempted to discourage Picozzi from pursuing the matter further. Despite her representations to Picozzi, however, it was later established that Eklund had not only ordered the search, she had also instructed Nafranowicz to hide Eklund's role in the matter from Picozzi. Sandalow refused to see Picozzi about the matter.

Ten days after the search, on February 14, 1983, Picozzi entered the law school to find dozens of posters placed all over the walls, depicting his head superimposed upon the body of a cherub carrying a machine gun, and proclaiming "A FIST FULL OF FIREPOWER." When Picozzi approached Eklund, she denied knowing the source of the posters. Moreover, Eklund insisted that it would be impossible to determine who had in fact created the posters -- despite the fact several dozen had been hung on the law school walls. At Picozzi's Disciplinary Hearing two years later, it was easily established that Thomas Good and another law student, David Berger,[2] had hung the posters.

---

2. Berger was a close friend of both Good and Miltonberg, and had been present when the gun rumor had first been generated.

At approximately 4:10 a.m. on March 8, 1983, unknown persons opened the door to Picozzi's room in the U-M law dormitory, splashed in a quantity of gasoline and ignited it. As the resulting inferno blocked the door, Picozzi was only able to escape the room through a window. He first balanced on the sill for almost 12 minutes while calling for help, but finally lost his balance and fell some 40 feet to the ground.[1] Curiously, within two hours

---

3. Picozzi was burned over 12% - 15% of his body exterior, as well as having his throat seared by the hot air. Additionally, the toxic smoke and soot inhaled by Picozzi required that he be placed on oxygen for several weeks and undergo painful respiratory therapy. The fall shattered Picozzi's spine, leaving his lumbar III vertebra in three distinct pieces. Additionally, the impact tore all of the ligaments in the lumbar region of his back and caused severe nerve trauma, leaving

Footnote Continued

of the fire, the Ann Arbor police decided to investigate only Picozzi, the victim of the fire, rather than other, more obvious, suspects.[4]

---

3. Footnote Continued From Previous Page

Picozzi's bladder and bowels paralyzed for a short time. Picozzi ultimately required surgery, where a piece of his left hip was grafted onto his spine and, additionally, two steel rods were placed in his back. Picozzi was encased in a full body cast from April 1983 until October 1983.

4. When Miltonberg arrived for class at the law quad on the morning of March 8 and allegedly learned of the fire for the first time, he immediately went to Assistant Dean Eklund to assure her that he had not set it because, as he later stated, he knew he would be a suspect. Yet, notwithstanding his concern with his possible status as a suspect, when questioned about his whereabouts by the police just days later, Miltonberg said he could not remember where he was in the hours preceding the fire.

Just two hours prior to the fire, Berger and Good were out drinking

Footnote Continued

The investigation conducted by the Ann Arbor police consisted primarily of

---

4. Footnote Continued From Previous Page

with yet another student who had passed rumors about Picozzi, Katherine Rutkowski. Good, who originally stated that he was sleeping so soundly when the alarm went off that his roommate had to shake him awake, later admitted he frequently pretended to be asleep. A student who later saw him in the courtyard testified that, from a distance of several yards, Good shook visibly and refused to walk around to the other side of the building to see what had happened to Picozzi. Rutkowski insisted she had slept through the fire and dormitory alarm, yet testimony at the Disciplinary Hearing revealed that other students had knocked on her door during the fire and received no response.

At the Disciplinary Hearing, Detective David Jachalke, who supervised the investigation, testified that the only investigation of Miltonberg, Berger and Good was to ask them where they were at the time of the fire. No corroboration was sought. Rutkowski was not even questioned.

interviewing other U-M law students, informing the students of their belief that Picozzi had set the fire, and then harvesting the rumors which their own statements inevitably caused. Additionally, police officers visited Picozzi on several occasions in the intensive care ward of the U-M hospital where Supervising Detectives Jachalke and Atkinson attempted to induce Picozzi to convess by stating, *inter alia*, that they had "absolute proof" of Picozzi's guilt and that they would not rest until he was behind bars.[5]

---

5. At the Disciplinary Hearing two years later, Sandalow's counsel argued that the hospital cardiac monitor attached to Picozzi during these sessions acted as a crude polygraph. Sandalow's counsel argued that the quickening of Picozzi's heartbeat while Jachalke and Atkinson accused him of a felony was evidence of Picozzi's guilt.

Due to a lack of evidence, on March 31, 1983 the Washtenaw County Prosecutor officially declined the request by the Ann Arbor police to prosecute Picozzi. On that date, Detective Jachalke not only relayed the Prosecutor's decision to Sandalow but also, as Sandalow has sworn, "detailed" all the evidence collected by the police investigation. In other words, on March 31, 1983, the police informed Sandalow there was no credible evidence against Picozzi -- and, in fact, that they were marking the case "inactive." At that time, Sandalow neither pursued the investigation on his own nor charged Picozzi with any offense. [6]

---

6. Around this time, life at the U-M Law School had become undeniably dangerous. In the month of March alone, the following unrelated

Footnote Continued

Furthermore, during the entire month following the fire, neither Sandalow nor any other law school official even attempted to contact Picozzi.

Instead, on April 1, 1983, two letters were hand delivered to Picozzi in the U-M hospital. In one letter,

---

6. Footnote Continued From Previous Page

events transpired: 1) Picozzi's room was set on fire; 2) one law student jumped and beat a second so severely that the second student required hospitalization; 3) a law student terrorized a law professor to the point where, allegedly, police protection was sought; 4) the number of obscene, threatening, and even death threatening phone calls to law students reached epidemic proportions.

On April 4, 1983 Sandalow responded to these disturbing incidents by writing a memo to the Law School community. In the memo, he characterized the occurrence of so many deviant acts in so short a period as nothing more than a "fortuitous circumstance."

Assistant Dean Eklund informed Picozzi's father, that she had received the father's request for a tuition refund. Eklund further stated that she was, in fact, refunding the tuition and, consequently, disenrolling Picozzi. In the second letter, Diane Nafranowicz informed Petitioner Picozzi that as he was no longer a student at the U-M law school, the lease for his dormitory room was being cancelled and he had already been locked out of the room.

In fact, Picozzi's father had never requested a tuition refund. Immediate phone calls by Picozzi's father to Eklund and Nafranowicz to deny the making of such a request met with no results. Phone calls to Sandalow and U-M President Harold Shapiro would not be received. Registered letters to Eklund and Nafranowicz, from both

Picozzi's father and Picozzi himself, stating that no request for tuition refund had ever been made, were never answered. Moreover, the alleged tuition refund which "necessitated" both the disenrollment and the lock-out never occurred. To this day, the University of Michigan continues to hold Picozzi's money.

During the second week of May 1983, while still awaiting an answer to the registered letters, Picozzi began to seek legal counsel from his convalescent bed. On May 11 or 12, 1983, he contacted Vincent Barker, a private practitioner in Toledo, Ohio and sometime lecturer at the U-M Law School, and asked him to recommend a lawyer who would be willing to bring suit against U-M on Picozzi's behalf. Barker declined to provide such a

recommendation, however, stating that due to his affiliation with the U-M law school, it might be construed as a conflict of interest.

By letter dated May 13, 1983, Sandalow contacted Picozzi for the very first time since the March 8 fire.[7] (App. 50.) He began his letter by stating he had spoken to Vincent Barker. Next, despite his explicit knowledge that the investigation had been concluded some six weeks before, Sandalow implied that a police investigation was ongoing and urged Picozzi to cooperate by submitting to a polygraph examination administered by the police. Further, he informed

---

7. The District Court held this letter to be constitutionally adequate notice. (App. 33; 623 F. Supp. at 1580.)

Picozzi that, unless he submitted to the polygraph examination, an "administrative proceeding" would be required before Picozzi would be permitted to re-enroll. Significantly, Sandalow made no charge against Picozzi, identified no evidence purporting to inculpate him, and failed to inform Picozzi of the rules or nature of the "administrative proceeding."[8] Indeed, Sandalow has

---

8. The U-M Law School Student Handbook contained detailed Rules on charging and adjudicating acts of student misconduct. The Rules provided for detailed notice, including a specific charge, explanation of the procedures, the student's rights and, ultimately, notice of the evidence discovered by a member of the faculty specially designated to investigate. The Law School Court provided a right to cross-examine or depose, a right to counsel, a right to remain silent, a right to an open hearing, and a burden on the Law School to prove its charge by a standard of clear and convincing evidence. Comparing Sandalow's

Footnote Continued

explicitly maintained that he neither intended the letter to be constitutional notice nor ever gave Picozzi constitutional notice, because he "never accused" Picozzi of anything at any time.

Picozzi immediately sought legal counsel in order to respond properly to Sandalow's letter. Notwithstanding physical and financial constraints, in late May 1983, Picozzi succeeded in retaining Detroit attorney Richard M. Goodman to represent him. During the following summer, Picozzi waited for Goodman either to respond directly to Sandalow or advise Picozzi how to

---

8. Footnote Continued From Previous Page

letter to the Handbook Rules, it was clear to Picozzi that he was neither being charged under the Rules, nor was the "administrative hearing" to which Sandalow referred the one provided for by the Rules.

respond properly to Sandalow. When Goodman failed to take any action by October 1983, Picozzi discharged him.

In October 1983, Picozzi also contacted James Thomas, Dean of Admissions and Student Affairs at the Yale Law School, to explore the possibility of transfer. Thomas urged Picozzi to determine his precise status at the University of Michigan and to acquire a "letter of good standing,"[9] without which no law school would consider Picozzi's transfer application on its merits.

---

9. A letter of good standing is a paper representation of a student's protected interest, i.e., it states that he is free to continue at his institution. The issuance of such a letter to a student who has not been suspended or expelled is a ministerial act, analagous to providing a student with a copy of his transcript. See infra note 19.

Picozzi made inquiries to Sandalow regarding his status and requested a letter of good standing. In response, Sandalow stated that Picozzi was "on a leave of absence from the law school, having withdrawn while in good academic standing." Yet, he refused to furnish the requisite letter of good standing. Moreover, Sandalow still failed to charge Picozzi with an offense or to state if there was any inculpatory evidence or information. As is now abundantly clear, the Ann Arbor police had no incriminating evidence against Picozzi and Sandalow knew it.

Unable to obtain a letter of good standing, Picozzi turned, in the first half of 1984, to investigating the matter himself. This included not only collecting more evidence, but acquiring the supposedly incriminating police

report.[10] During this period, Detective Jachalke admitted to Picozzi that the case had been marked inactive on March 31, 1983, that no charges were being contemplated against Picozzi, that the case was considered over, and that Sandalow had been informed of all these facts. Additionally Picozzi sought an attorney willing to represent him.

---

10. Due to the unwillingness of the Ann Arbor police and fire departments to provide Picozzi with copies of their records relating to the fire, Picozzi was only able to obtain the relevant records through the efforts of a Detroit law firm, at which a friend worked. After obtaining the records, the firm refused to represent Picozzi in any further action because it was not prepared to be placed in an adversary position to the University of Michigan. Subsequently, more than a dozen Midwestern attorneys and law firms refused to represent Picozzi for similar reasons.

Finally, in July 1984, Picozzi induced the law offices of William Kunstler to take his case. Kunstler exchanged letters with several U-M officials -- including University President Harold Shapiro, University General Counsel Roderick Daane, and Sandalow himself -- but the University refused to issue the letter of good standing. Still, Sandalow neither charged Picozzi with any infraction nor disclosed if there was any evidence against him. Thus, in August 1984, Kunstler's office brought a lawsuit on Picozzi's behalf seeking compensatory and punitive damages, attorney's fees, and an injunction to provide Picozzi with a letter of good standing, so that he could resume his studies pending resolution of the controversy.

The case first came before the Honorable Charles Joiner, Federal District Judge in the Eastern District of Michigan and former Acting Dean of the U-M law school. Judge Joiner recused himself and the case was assigned to another U-M law alumnus, the Honorable John Feikens.

On August 30 and 31, 1984, Judge Feikens held a hearing to show cause why an injunction should not issue. The transcript of that hearing reveals that Picozzi was always prepared to submit to a Disciplinary Hearing with the procedures published in the Law School Handbook (App. 56-60.) Sandalow's attorney, Peter Davis, continually refused to hold such a hearing. (App. 54, 60.) Obviously, Sandalow had intended to provide Picozzi with much less process than was due him under the

law school rules (App. 54-55.) Indeed, when Davis was finally challenged by Judge Feikens to specify the precise procedure being offered by Sandalow to Picozzi, Davis requested an adjournment because he did not know (App. 61.)

Ultimately, under Judge Feikens' in-court supervision, the parties agreed upon procedures to be followed in a Disciplinary Hearing. Specifically, the procedures would now include (1) notice of a charge and evidence, (2) the Law School having to prove its case by a clear and convincing evidence standard, (3) an impartial hearing officer, (4) a right to cross-examination, (5) a right to counsel, and (6) the right to an open hearing.

Even though it had been 18 months since his suspension, Sandalow continued

to delay.[11] The Disciplinary Hearing did not finally commence until February, 1985.

---

11. First, Sandalow's counsel incorrectly insisted that the agreement at the Injunction Hearing had been that the Hearing Officer would be a retired Michigan judge. Second, Sandalow's counsel continually rejected suggested Hearing Officers, insisting that the Hearing Officer be someone whom he knew, but not someone Picozzi's attorneys knew. Specific suggestions for Hearing Officers were rejected by Sandalow's counsel for the most frivolous reasons. For example, Michigan attorney John Fillion was rejected as a Hearing Officer because Fillion "is counsel to the UAW and is unacceptable since the UAW will not let me park my Porsche in their lot." Finally, both sides agreed that each would name an arbiter and that the two arbiters would make a binding selection of a Hearing Officer. The arbitration plan did not succeed because Sandalow's counsel refused to consent to any of the arbiters' choices. Finally, only when the arbiter chosen by Sandalow's counsel quit in January 1985, did Sandalow's counsel agree to have Robert Guenzel act as Hearing Officer.

Sandalow's counsel, who served as prosecutor at the Disciplinary Hearing, made the testimony of gas station attendant Brian Myers the keystone of his case.[12] Myers had been on duty at an all-night gas station two blocks from the law school on March 8, 1983, the night of the fire. The one piece of potentially incriminating evidence in

---

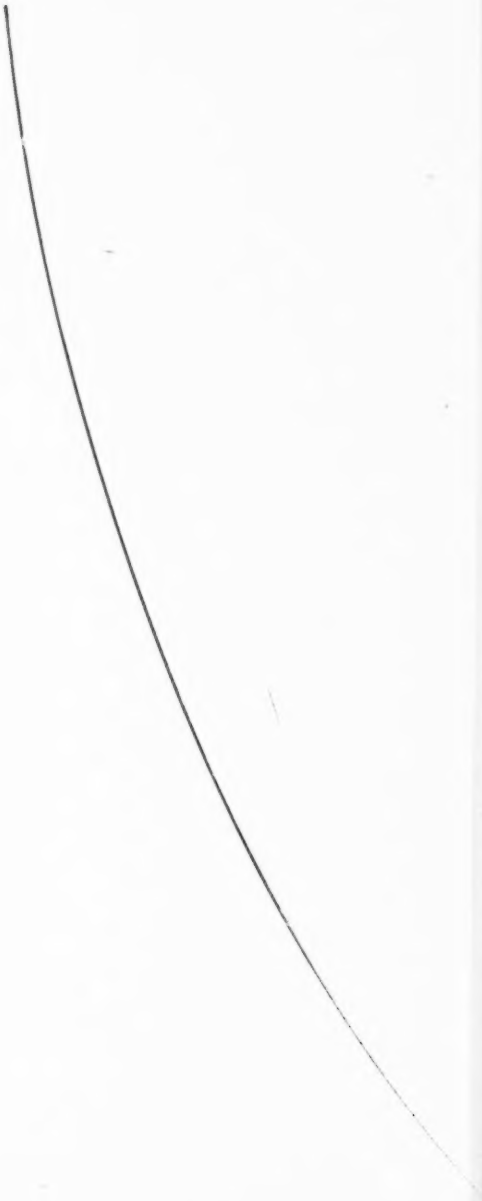
12. There were two other major prongs to Sandalow's case. The first prong was testimony by an arson expert. However, the Hearing Officer's opinion confirms that Sandalow proved nothing with the testimony of the arson expert and -- more germane to the suspension of a student in the spring of 1983 -- Sandalow's counsel did not retain his arson expert until February 1985. The second prong was medical expert testimony. Specifically, Sandalow's counsel proffered testimony that Picozzi's burns indicated that he had set the fire. Both medical experts called by Sandalow's counsel, however, testified that there was no way to tell.

the 149-page report provided to Picozzi was a March 11, 1983 interview of Myers by Detectives Jachalke and Atkinson. According to the report, Myers stated during the interview that, at approximately 1:00 a.m. on the morning of March 8th he had sold gasoline to a white male, approximately 5'9" to 5'10" tall, wearing a blue down parka, and missing two fingers on his right hand.

As it turned out, a third officer, Detective Sergeant Gerald Miller, had also been investigating the case. At the end of his late shift on March 8, 1983 -- less than 24 hours after the actual fire, and before Jachalke and Atkinson had seen Myers -- Miller had stopped at the same all-night gas station and had interviewed Myers. Miller asked Myers if he had sold a small quantity of gasoline to anyone

from 11 p.m. on March 7th until 7 a.m. on March 8th. When Myers said "no," Miller specifically asked him if he had sold any quantities of gasoline to a short, white male, who was missing two fingers on his right hand. Myers replied he had not. Although Miller took notes during the interview, he did not immediately write a report because his questions had produced negative replies.

When, just a few days later, Jachalke told Miller of the new evidence against Picozzi elicited in the second interview with Myers, Miller told Jachalke that Myers had previously denied selling gasoline to anyone, and had specifically denied selling gas to a short, white male missing two fingers on his right hand.



After speaking to Jachalke, Miller wrote a report of his interview with Myers. That report disappeared from the records of the Ann Arbor police.

Although later admitting he knew of Miller's exculpatory evidence,[13] Sandalow's counsel called Brian Myers as his star witness in the Disciplinary Hearing. Myers, in February, 1985, for the first time identified Picozzi as the

---

13. At no time prior to the calling of Detective Sergeant Miller as a defense witness did any University of Michigan official ever mention him. Rather, the exculpatory evidence Miller possessed was only uncovered through the efforts of a private investigator hired by Picozzi. When challenged during the Disciplinary Hearing summation of Picozzi's attorney to explain why he had neither spoken to Detective Miller before the hearing nor mentioned him during his summation, Sandalow's counsel replied, in rebuttal, "I didn't talk to Miller because I knew what he was going to say."

man who had purchased gasoline from him -- but his story began to unravel even as he testified. Myers admitted he had spoken to Miller before speaking to Jachalke and Atkinson, but insisted that he had told all three officers the same story. Yet, now he insisted Picozzi had driven into the station while Jachalke and Atkinson testified he had earlier given them the impression that Picozzi had walked in. Myers additionally testified that not only had either Detective Jachalke or Atkinson provided him with a description of Picozzi, but also that the officers had pushed on him hard to identify the student. Most telling, though, was when Myers, who described himself as being 5'10 1/2" tall, explained how he came to realize that Picozzi was not 5'10", but rather only about 5'4". Myers testified that,

prior to his in-court identification, Sandalow's counsel had coached Myers that Picozzi was "shorter, much shorter."

Detective Jachalke, called as a witness after Myers, testified that -- except for the detail of the missing fingers -- Myers' description had always been general and contradictory. Myers had never mentioned either eye-glasses or a mustache, both of which Picozzi wore at the time of the fire. No evidence was ever found that Picozzi owned a blue parka such as the one described by Myers. Moreover, Jachalke testified, Myers had not been able to identify Picozzi's photograph. He admitted that, after having spoken with Detective Miller, he considered Myers'

testimony as being valueless.[14] Detective Miller, called as Picozzi's first defense witness, recounted the story of his interview with Myers.

The Disciplinary Hearing concluded on March 21, 1985.

The Hearing Officer filed an opinion ruling for Picozzi on August 22, 1985. In it, he stated, "Myers' testimony is inconsistent and at odds with credible testimony such as that of Sergeant Miller. I conclude that it is tainted and must discount it as the Ann Arbor police did." A letter of good standing was issued to Picozzi (App. 52), which

---

14. Jackalke's conversation with Miller took place before Jackalke's conversation with Sandalow On March 31, 1983, in which Jackalke detailed the evidence.

he then immediately used to transfer to the Yale Law School.[15]

On November 12, 1985 Sandalow moved for summary judgment before Judge Feikens in this civil action. Picozzi cross-moved for summary judgment. Judge Feikens ruled for Sandalow on January 2, 1986, stating in his opinion, *inter alia*, that Sandalow had deprived Picozzi of a protected interest (App. 14; 623 F.Supp. at 1576), but that the delay in returning Picozzi to school was Picozzi's own fault. (App. 36; 623 F.Supp. at 1580.)

---

15. Picozzi graduated from Yale in May, 1987. He was an Editor of the *Yale Law Journal* and recipient of the Nathan Burkan Award. He is currently an Associate at the law firm of Fried, Frank, Harris, Shriver & Jacobson in New York City. Beginning in August 1988, Picozzi will clerk for the Honorable Anthony J. Scirica of the United States Court of Appeals for the Third Circuit.

On August 28, 1987, the United States Court of Appeals for the Sixth Circuit affirmed the District Court's ruling, adopting Judge Feiken's opinion. (App. 48; 827 F.2d 770.)

REASONS FOR GRANTING THE WRIT

Review should be granted for three reasons. First, the Court should finally hold that a student at a public university has an interest in his education protected under the 14th Amendment. It should then affirm -- in this of all cases -- the responsibility of the state to provide proper notice. Second, the indefinite standard of *Goss v. Lopez* has spawned litigation. School administrators have been free to call any type of teacher-student interaction a hearing and students, consequently, have been forced to sue to obtain true process. The time has come for this

Court to make students' due process rights concrete by saying what procedures are due in specific contexts. Third, the Court must unequivocally decide whether a person who vindicates his civil rights with a lawsuit receives attorney's fees by right, or only by grace.

Responsibility For Notice

1. While this Court has avoided deciding whether students at public universities have an interest in their educations protected by the due process clause of the Fourteenth Amendment, see *Ewing v. Board of Regents of the University of Michigan*, 474 U.S. 214, 222-23 (1985), lower courts have unanimously held that they do. See, e.g., *Ewing v. Board of Regents of the University of Michigan*, 742 F.2d 913, 915 (6th Cir. 1984); *Gaspar v. Bruton*,

513 F.2d 843, 850 (10th Cir. 1975); *Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150 (5th Cir.), *cert. denied* 368 U.S. 930 (1961).

Goss v. Lopez, 419 U.S. 565, 579 (1975) affirmed the due process rights of public school students facing interference with those interests for disciplinary reasons, including the rights to "some kind of notice and . . . some kind of hearing." *Id.* at 579. At a minimum, stated this Court in *Goss*, notice must inform the student of "what he is accused of doing and what the basis of the accusation is." *Id.* at 582. Moreover, the requirement of adequate notice is invariably stressed as a precondition to a fair hearing because the right to a hearing "has little reality or worth unless one is informed that the matter is pending and

can choose for himself whether to appear or default, acquiesce or contest." *Mullane v. Central Hanover Trust Company*, 339 U.S. 306, 314 (1950); *accord*, *Goss v. Lopez*, 419 U.S. at 579.

2. Respondent Sandalow argued below that he had no obligation to provide notice until Picozzi stated he would contest disenrollment. Specifically, while Sandalow had already told Picozzi in the May 13 letter that he could not re-enroll (App. 50), until Picozzi said he wanted to return to law school, Sandalow argues he had not deprived Picozzi of anything. He admits he never charged Picozzi with anything.[16]

---

16. Sandalow not only admits he never charged Picozzi, he positively trumpets the fact. See Sandalow's affidavit of October 15, 1985, ¶ 6: "I did not at any time accuse Mr. Picozzi of responsibility for the

Footnote Continued

Thus, his argument runs, since Sandalow took no disciplinary action against Picozzi, there was no reason to give notice or to take any other affirmative steps.[17] Yet, at the same time, Picozzi was barred from school and denied the requisite letter of good standing.

Sandalow further took the position that Picozzi's request for a letter of

---

16. Footnote Continued From Previous Page

March 8 fire." (Attached to Motion by Defendant Sandalow for Summary Judgment.) *See also* Reply Brief of Defendant Sandalow on Motion for Summary Judgment, at p. 3: "First Sandalow never accused Picozzi of anything."

17. "Since Picozzi had not been accused of anything and since no disciplinary action had been taken against him, there was nothing of which to give notice." Reply Brief of Defendant Sandalow on Motion For Summary Judgment at p. 5.

good standing (i.e., a letter stating that Picozzi was free to re-enroll) was not the same as asking to re-enroll. A letter of good standing, according to Sandalow, is a matter of grace, analogous to a letter of recommendation. Consequently, by withholding one from Picozzi he was not depriving him of a protected interest and, again, had no duty to move forward with notice and a hearing.

3. The District Court wasted little time in piercing so contrived and transparent a fiction.[18] Judge Feikens held that Sandalow's refusal to issue the letter altered Picozzi's status at the Law School and made it

---

18. As the Court of Appeals adopted the District Court opinion (App. 53), for simplicity all arguments will refer only to the District Court.

impossible for him freely to pursue his studies there or at any other accredited law school. (App. 14; 623 F. Supp. at 1576.) The controversy over the letter reflected the "underlying dispute" over Picozzi's status at the University. (App. 17; 623 F. Supp. at 1576.)

Based on this analysis, Judge Feikens found the following: 1) that a letter of good standing is a protected interest (App. 14; 623 F.Supp. at 1576); 2) that Sandalow deprived Picozzi of that protected interest (Id.); and 3) that the deprivation could not legally take place without due process, including notice.[19] (App. 22, 23; 623

---

19. Without such a letter, most universities will not consider the student's application on its merits at all; in certain

Footnote Continued

F.Supp. at 1577, 1580.)

Yet, the District Court then went on to find Picozzi received adequate notice in the May 13 letter -- even though the letter made no charge, identified no evidence and no rules of procedure -- and which Sandalow himself admits was not notice (App. 33; 623 F.Supp. at 1580). In essence, the District Court opinion placed the burden on Picozzi to have moved ahead and bound himself to a hearing to be devised after the fact, where Picozzi would have had

---

19. Footnote Continued From Previous Page

graduate-professional fields, such as law and medicine, no schools will accept a student who cannot produce such a letter. See Picozzi's own Note, *University Disciplinary Process: What's Fair, What's Due, and What You Don't Get*, 96 Yale L. J. 2131, 2138-39 (1987) [hereinafter Picozzi, *Disciplinary Process*].

to clear himself of suspicion against unspecified charges.

4. Review is appropriate on this issue because, if allowed to stand, the District Court's opinion will destroy a basic tenet of due process -- that one must receive notice of a charge, evidence and procedures before deciding whether to contest. The District Court's rule would impoverish the due process rights not just of students, but of a broad spectrum of vulnerable individuals, especially those who cannot afford legal counsel. It shifts the burden onto the person deprived to vindicate his procedural rights -- assuming he knows that he possesses such rights. It creates the procedural equivalent of placing someone in jail and then doing nothing unless he requests an indictment.

Instead, the responsibility to ensure that a person receives his procedural due should lie with the same authority that takes his property or liberty. The meaning of the 14th Amendment is quite plain on its face: the State shall provide due process of law.

5. While the facts of this case are egregious -- a law school dean who suspends a student indefinitely without ever bringing a charge or identifying evidence -- the implications extend far beyond these two people or what notice should include. *Goss* protects a discrete group of people; this case is about all of them. Students are not only young and vulnerable, they have a naive sense of fairness. That sense of fairness should be protected and nurtured, for it will be trod upon soon

enough as they go through life. To protect students, and nurture their sense of fairness, is the motivating spirit of *Goss v. Lopez* -- or, at least, it should be.

If adopted, Judge Feikens' opinion will destroy some of *Goss*' procedural protections, but in so doing, it will destroy all of *Goss*' nurturing spirit. The decision whether to undercut *Goss*, consequently, affects students who will never face suspension as well. As the 5th Circuit observed:

> In the disciplining of college students there are no considerations of immediate danger to the public, or of peril to the national security, which should prevent the [University] from exercising at least the fundamental principles of fairness by giving the accused students notice of the charges and an opportunity to be heard in their own defense. Indeed, the example set by the Board in failing so to do, if not corrected by the courts, can well break the spirits of the

> expelled students and of others familiar with the injustice, and do inestimable harm to their education.

Dixon v. Alabama State Bd of Educ., 294 F.2d 150, 157 (5th Cir. 1961), *cert denied*, 368 U.S. 390 (1961).

What Kind of Hearing

1. In *Goss v. Lopez*, 419 U.S. 565, 579 (1975), this Court held that "students facing suspension and the consequent interference with a protected property interest must be given some kind of notice and . . . some kind of hearing." The Court noted that the specific procedures provided in *Goss* were for the ten-day high school suspension involved in that case. A longer suspension or an expulsion, stated the Court, "may require more formal procedures." *Id.* at 584.

2. The District Court held that while Picozzi had an interest triggering

due process, he was not entitled to a hearing prior to deprivation of that interest (App. 24; 623 F. Supp. at 1578). The District Court reasoned that the suspension was only temporary, pending the outcome of a full hearing and, thus, did not implicate an interest as great as that of high school students in a ten-day suspension.[20] (App. 29,

---

20. Judge Feikens additionally stated that this case "falls squarely within the Goss provision for situations not requiring a pre-suspension hearing." (App. 26, 623 F. Supp. at 1578.) The portion of Goss to which he referred states the following: "Students whose presence poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process may be immediately removed from school. In such cases, the necessary notice and rudimentary hearing should follow as soon as practicable . . . . " *Goss v. Lopez*, 419 U.S. 565, 582-83 (1975).

Judge Feikens' assertion that this case falls within that exception is

Footnote Continued

623 F.Supp. at 1579.) Judge Feikens reaches this conclusion by erroneously

---

20. Footnote Continued From Previous Page

untenable. First, as Picozzi spent the first seven weeks following the fire in various hospital beds unable to walk, and the next 6 months in a full body cast barely able to walk, it is difficult to understand how he could pose an "ongoing threat" to anyone. Second, a 2-1/2 year exclusion hardly seems the type of temporary suspension the exception contemplates. Third, and most importantly, even if Sandalow did honestly believe Picozzi to be an "ongoing threat", it does not provide a reason for Sandalow's failure to charge him. In fact, the *Goss* exception to which Judge Feikens pointed only makes clearer that, having suspended Picozzi, the burden lay on Sandalow to provide notice "as soon as practicable".

Additionally, Picozzi contests Judge Feikens' assertion that Picozzi's counsel agreed that this case falls with the *Goss* exception. (App. 26, 623 F. Supp. at 1578, n.7.) He did not. He merely acknowledged the exception and hypothetically discussed how it could apply to a student who was suspected of setting a fire. Nonetheless, even while

Footnote Continued

and improperly finding that Picozzi caused the delay.[21] However, even if

---

20. Footnote Continued From Previous Page

discussing the hypothetical, Picozzi's counsel was quick to note that with a pre-hearing suspension, notice and hearing must follow immediately thereafter -- critical events which did not occur in this case. (App. 26.)

21. Summary judgment may not be entered where material issues of fact exist. FED. R. CIV. P. 56(c). Here, Judge Feikens made two dispositive findings of fact: first, that Picozzi, rather than Sandalow, resisted holding a hearing (App. 35, 623 F. Supp. at 1580); second, he implicitly found that, had Picozzi accepted Sandalow's offer of an administrative hearing, he would have been provided with a fair procedural hearing. The Injunction Hearing transcript clearly shows that Picozzi was always ready to submit to a hearing in accordance with the Handbook Rules (App. 56-60.); it was Sandalow who refused. Whether the unspecified, "less cumbersome" hearing would have been fair is a matter for a jury. Enough evidence certainly exists in the record, even absent discovery, for a jury to find it would not have been fair.

one assumes that the burden lay with Picozzi to respond immediately to the original May 13 letter, Judge Feikens' opinion does not discuss why, after Picozzi filed this action, it still took Sandalow five months to stage a hearing and a full year before Picozzi received his letter of good standing. More importantly, Judge Feikens' opinion does not satisactorily explain why that exclusion from law school was a lesser deprivation than a ten-day suspension from high school. Most importantly, however, Judge Feikens' opinion suggests that Picozzi should have accepted Sandalow's offer, without knowing the precise, or even general, procedure to which he would be bound.

3. Review is needed on this issue because the *Goss* "some kind of hearing" standard has been an absolute disaster

for students in this country. Without a more specific requirement of exactly what procedures are due in what contexts -- and, instead, leaving procedure to be drawn by the very people against whom it should afford protection -- school officals have been free to call any kind of teacher-student meeting due process. They can appear impartial and flexible, while in fact stacking the procedural deck,[22] often

---

22. For a survey of what disciplinary procedure public colleges and universities in this country have been providing, see Golden, *Procedural Due Process for Students at Public Colleges and Universities*, 11 J.L. & Educ. 337 (1982). Among responding institutions, Golden found that 36.2% did not allow cross-examination by defense -- not even by the accused student -- and 37.9% did not allow the student to have legal counsel. Staggeringly, 55.2% did not guarantee the student an impartial decisionmaker (in the form of either a hearing officer or

Footnote Continued

by deciding on the procedure after deciding on the culprit. Predictably, this has spawned litigation, as those students who could manage it brought suit to vindicate their rights.[23]

---

22. Footnote Continued From Previous Page

a tribunal), 60.3% did not guarantee the student a right to confront his accusers, 75.9% did not guarantee the student written findings of fact, and 91.4% provided students with no assistance of any kind -- let alone compulsory process -- in getting specific persons to testify at proceedings. *Id.* at 345-47. Golden did not inquire as to conviction rates.

23. See, e.g., *Crook v. Baker*, 584 F.Supp. 153 (E.D. Mich. 1984), *rev'd* 813 F.2d 88 (6th Cir. 1987); *Nash v. Auburn University*, 812 F.2d 655 (11th Cir. 1987); *Hall v. Medical College of Ohio at Toledo*, 742 F.2d 299 (6th Cir. 1984), *cert. denied*, 469 U.S. 1113; *Jones v. Board of Governors of University of North Carolina*, 704 F.2d 713 (4th Cir. 1979); *Gabrilowitz v. Newman*, 582 F.2d 100 (1st Cir. 1979); *Gorman v. University of Rhode Island*, 646 F.Supp. 799 (D.R.I. 1986); *Jaksa v.*

Footnote Continued

The issue must be resolved once and for all. School officials need to know what procedures must be provided and students need to know upon what procedure they can rely. Rules offer no protection if administrators can simply wish them away.

4. Sandalow not following the Student Handbook Rules[24] made Picozzi

---

23. Footnote Continued From Previous Page

Regents of the University of Michigan, 597 F.Supp. 1245 (E.D. Mich. 1984); *Hart v. Ferris State College*, 557 F.Supp. 1379 (W.D. Mich. 1983); *Bleiker v. Board of Trustees of Ohio State University College of Veterinary Medicine*, 485 F.Supp. 1381 (D.Ohio 1981). For a more complete examination of these and other student discipline cases, as well as an analysis of the burdens a student faces when his university employs unfair procedure, see Picozzi, *Disciplinary Process*, *supra*, note 19.

24. See supra note 8.

suspect the Dean would try to bind him to a hearing with less procedure. Picozzi was right. At the Injunction Hearing, Sandalow's counsel not only admitted that a specific procedure had not been decided upon (App. 54), but also that Sandalow intended to give Picozzi less procedure than that provided in the Handbook. (App. 55.)

By fighting for fair procedures, rather than simply accepting whatever Sandalow deigned to provide, Picozzi proved that due process need not be an empty phrase. Specifically, by bringing this civil action, he won the right to limited discovery, counsel, and cross-examination -- without any of which he would not have exposed the false testimony of Brian Myers and, ultimately, saved his legal career.

Sandalow, at any time, simply could have charged Picozzi under the Law School's published procedures, but did not. And he has never been made to explain why not.

The reason, however, is self-evident: the Handbook Rules were fair and Sandalow knew there was no credible evidence Picozzi set the fire. So, he ignored the Rules and the procedural elements they contained.

Instead, he suspended Picozzi without providing notice, hoping Picozzi would either 1) incriminate himself with a polygraph examination administered by the Ann Arbor Police, or 2) agree to a less formal hearing where he could be convicted, or 3) face the prospect of suing the Dean of the Michigan Law School in the Eastern District of Michigan, or 4) just go away. The one

thing Sandalow did not offer, or ever want to do, was to try to prove Picozzi set the fire in a procedurally adequate hearing.

6. This case illustrates why process must be provided before, not after, the deprivation of a protected interest. That Picozzi ultimately returned to law school does not make the injury whole. It does not replace 2 1/2 years lost to anxiety. It does not replace 2 1/2 years of lost wages. Most of all, it does not provide a sufficient answer when colleagues and potential employers ask about 2 1/2 missing years.

Prevailing Party

1. This Court has long held that a "prevailing party" in an action covered by 42 U.S.C. § 1988 should recover attorney's fees absent special

circumstances. See, e.g., *Kentucky v. Graham*, 473 U.S. 159, 164 (1985). Reading the legislative history of the statute more closely, the United States Court of Appeals for the Sixth Circuit articulated the rule this way:

> This statute did more than simply enable the lower courts once again to award fees; rather than being an equitable remedy, flexibly applied in those circumstances which the court considers appropriate, it is now a statutory remedy, and the courts are obligated to apply the standards and guidelines provided by the legislature in making an award of fees.

Northcross v. Board of Ed., 611 F.2d 624, 636 (6th Cir. 1979) (emphasis in the original), *cert. denied*, 447 U.S. 911 (1980).

More importantly, prior decisions of this Court should leave no doubt that a prevailing party includes a plaintiff who succeeds in obtaining relief by way of a settlement. *Smith v. Robinson*, 468

U.S. 992, 1006 (1984); *Maher v. Gagne*, 448 U.S. 122, 132 (1980).

2. The District Court raised the issue of attorney's fees sua sponte (no motion having yet been made by Picozzi) and then denied them. (App. 44-46; 623 F.Supp. at 1582-83.) Judge Feikens based his ruling not only on the presumption that there had been no due process violation, but on the fact that he had never issued the injunction for a letter of good standing and, therefore, Picozzi could not be a prevailing party. Straining to protect U-M officials, Judge Feikens stated further that, even if Picozzi were a prevailing party, he would use his "discretion" to deny attorney's fees in any event, but did not explain why. (App. 46; 623 F.Supp. at 1583 n. 12.)

3. By bringing this civil rights action, Picozzi got what he sought -- due process by which he could vindicate himself and, ultimately, claim his letter of good standing. Again, the transcript of the Injunction Hearing makes clear first, that Sandalow sought to give Picozzi less process than was due and, second, that it was Sandalow, not Picozzi, who resisted holding an adequate hearing. (App. 54-55, 60-61.) Undeniably, the only reason Sandalow finally had to say what procedure he was offering was because Picozzi forced him into court and a Federal judge posed the question.

Furthermore, without the procedures won in Judge Feikens' courtroom, especially the limited discovery and cross-examination rights, the false identification by Brian Myers

never would have been exposed. The conduct of Sandalow's counsel makes clear that he had no intention of divulging Detective Miller's exculpatory information.

4. Review is appropriate on this issue for two reasons. First, as long as federal judges believe that awarding attorney's fees under § 1988 is at their pleasure, rather than their obligation, the statute will not have its intended effect of stimulating civil rights actions.

Second, and what should be much more troubling, is that failure to award attorney's fees turns the judicial system into a shield which protects those who violate civil rights, rather than a sword to attack them. A person whose civil rights have been violated must not only acquire the capital to

bring a lawsuit, he must consider whether he can afford ultimately to pay off the cost even if he wins. This entire litigation, including the Disciplinary Hearing, has cost James Picozzi more than twice what tuition to law school cost him, all to receive process which should have been his -- not for the asking -- but rather without asking, let alone suing. Thousands of other people, whose names do not appear in the West Reporter system, have not been able to afford that cost. Whether a novel issue of law or not, the Supreme Court of the United States should never knowingly allow that number to grow.

CONCLUSION

This case is about many things, but perhaps most of all, it is about the way the legal community examines itself. A process which, because of the parties, should have been a model for fair procedure instead was a travesty -- inflicting much greater trauma and permanent harm on James Picozzi than the fire which almost killed him. It should not be allowed to go unexamined, swept under the rug by a questionable summary judgment.

For each of the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

James M. Picozzi
Pro Se
One New York Plaza
New York, N.Y. 10004
(212) 820-8000

APPENDIX

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JAMES M. PICOZZI,

Plaintiff,

v.

TERRANCE SANDALOW, Individually and in his Official Capacity as Dean of the University of Michigan Law School; et al.,

Defendants.

Civil Action No. 84-CV-7406-AA

Honorable John Feikens

OPINION

Plaintiff James M. Picozzi ("Picozzi") brings this action against defendant Dean Terrance Sandalow[1]

---

1. President Harold Shapiro and the University of Michigan Board of Regents are also defendants. Picozzi's counsel agreed on the record before me to dismiss the Board of Regents based on their

Footnote Continued

("Sandalow") citing the Constitution of the United States and 28 U.S.C. § 1983, seeking both injunctive and monetary relief. Since an administrative hearing held pursuant to the parties' agreement resolved Picozzi's claim for injunctive

---

1. Footnote Continued From Previous Page

Eleventh Amendment immunity. No stipulation and order of dismissal has yet been filed with the Court. I therefore order the dismissal with prejudice of the Board of Regents, thus conforming the record to counsel's agreement with me.

The Eleventh Amendment also provides immunity to Sandalow and Shapiro in their official capacities. Accordingly, I order that these defendants, in their official capacities, be dismissed with prejudice.

This leaves Shapiro and Sandalow as defendants in their individual capacities. This opinion deals primarily with defendant Sandalow's liability. Accordingly, unless otherwise indicated, a reference to "defendant" means "defendant Sandalow." I dismiss with prejudice defendant Shapiro for the reasons given infra, pp. 24-25.

relief,[2] only his damage claim remains before me. Both Picozzi and Sandalow move for Summary Judgment. I have jurisdiction pursuant to 28 U.S.C. §§ 1331, 1343.

---

2. On August 24, 1984, Picozzi filed a verified complaint seeking a preliminary injunction ordering Sandalow to issue a letter of unqualified good standing on behalf of Picozzi. During a hearing on Picozzi's Motion for Preliminary Injunction, the parties agreed to resolve through an administrative hearing the questions of Picozzi's responsibility for the March 8, 1983, fire, and of his standing at the Law School. The Hearing Officer issued his decision "that the University of Michigan has not, by clear and convincing evidence, established that James M. Picozzi started the fire in Room K-33 at the University of Michigan Law School on March 8, 1983" on August 22, 1985. Hearing Officer's Decision at 42. Pursuant to this decision, Sandalow issued a letter of good standing on August 23, 1985. After presenting this letter, Picozzi was accepted by Yale Law School, where he is currently enrolled. Picozzi Supplemental Affidavit ¶¶ 7, 8.

1. FACTS

During his second year at the University of Michigan Law School, Picozzi leased room K-33 in the Lawyers Club, the law school student residence. At about 4:00 a.m. on March 8, 1983, fire broke out in his room. Picozzi alleges that he awoke and attempted to leave the room and that because flames blocked the doorway to the hall, he used the third floor window to exit the room. He says he attempted initially to stay on the windowsill, but eventually either jumped or fell to the ground. As a result, he sustained burns and a fractured vertebra. He was treated at the University of Michigan Hospital from March 8 to April 2, 1983; he then transferred to the University of Pittsburgh Hospital in order to be closer to his family. He remained hospitalized until sometime in May,

1983, and in a body cast until October, 1983.

By April, 1983, it appeared that Picozzi would be physically unable to return to school, during the 1983 Winter Term. On April 1, 1983, Associate Dean Eklund informed Picozzi's father that Picozzi had been disenrolled for the remainder of the 1983 Winter Term. See Complaint, Ex. J. Sandalow maintains, as recited in Dean Eklund's letter, that Picozzi was disenrolled at the request of Picozzi's father, in order to facilitate tuition and lease rebates. Although Picozzi denies that either he or his father ever requested disenrollment, it is clear that his father at least sought information regarding tuition adjustments for students absent from school for an extended period for medical reasons. See Complaint, Ex. K. I note that this

factual dispute is not material to resolution of the case.

The fire aroused concern within the Law School community. In its March 16, 1983, edition, the Law School newspaper, Res Gestae, carried a front page story of the fire and its aftermath. The story included Sandalow's statement expressing distress over the incident and urging that rumors be quelled. See Complaint, Ex. G. On April 4, 1983, Sandalow again addressed the Law School community in an effort to calm the understandable anxiety created by acts of violence, including the fire within the dormitory. See Complaint, Ex. I.

Both public statements alluded to an ongoing police investigation of the fire. That investigation led the Ann Arbor Police Department to conclude almost immediately that the fire had been deliberately set. See Complaint,

Ex. A at 15, 17. The investigators also concluded that Picozzi himself had likely set the fire. See Complaint, Ex. A at 115-16. Nonetheless, the Washtenaw County Prosecutor's Office declined to prosecute the case. See Complaint, Ex. A at 116, 118.

On May 13, 1983, Sandalow wrote Picozzi informing him that he would not be allowed to re-enroll at the Law School unless he either took and passed a polygraph test conducted by the police department or prevailed at an administrative hearing. Sandalow noted that "the Law School and the University have an independent interest in determining the identity of the person responsible, especially because the continuing presence of that individual within the community would create a serious risk to its members." Complaint, Ex. N. On June 29, 1983,

Sandalow again wrote to Picozzi asking for a prompt reply in the interest of resolving the matter prior to the beginning of the 1983 Fall Term. See Complaint, Ex. G.

Picozzi responded to Sandalow's letters on July 18, 1983, stating that he was "not yet prepared to give a full response to [defendant's] ultimatum." Sandalow Affidavit, First Attachment. Although Sandalow replied on July 29, 1983, his letter was returned unclaimed. Sandalow Affidavit ¶ 6 and Second Attachment. In any event, the matter was not resolved prior to the 1983 Fall Term.

On November 7, 1983, Picozzi requested a letter from Sandalow regarding his academic status at the Law School. See Complaint, Ex. P. On November 16, 1983, Sandalow responded:

> I am writing in response to your letter of November 7, 1983

> requesting a statement regarding your academic standing and a copy of your transcript. A copy of your transcript is enclosed.
>
> My understanding is that you are currently on a leave of absence from the Law School, having withdrawn while in good academic standing. A question remains regarding your eligibility to re-enroll. As I wrote on May 13, 1983 and again on June 29, 1983, information that we have received from the police has raised a question regarding your responsibility for the fire in your room on March 8. My hope, as I have previously written, is that the question of your responsibility might be resolved by your taking a polygraph examination as requested by the Ann Arbor Police. Were you to take and pass such an examination, under the circumstances stated in my earlier letters, you would of course be eligible to re-enroll at the Law School. If, however, you decide against taking the examination or if you fail to pass it, a hearing would be necessary to determine your eligibility to re-enroll.

Complaint, Ex. Q.

On November 23, 1983, Picozzi asked Sandalow to write James Thomas, Dean of Yale Law School, informing him that

Picozzi is "currently on leave of absence from the University of Michigan Law School, having withdrawn while in good academic standing." Complaint, Ex. R. On November 29, 1983, Sandalow replied that "it would be misleading for me to [write the requested letter] without a further statement indicating that there is a question regarding your eligibility to re-enroll at the Law School." Complaint, Ex. S. On December 5, 1983, Picozzi repeated his request for an unqualified letter. See Sandalow Affidavit, Third Attachment. Sandalow replied on December 13, 1983, with a proposed letter to Dean Thomas including an explanation regarding Picozzi's conditional eligibility to re-enroll. See Complaint, Ex. T. Picozzi rejected the proposed letter. See Complaint Ex. U. This ended the parties' communications with each other.

On July 30, 1984, Picozzi's counsel demanded that Sandalow write an unqualified letter of good standing. See Complaint, Ex. V. Sandalow refused. See Complaint, Ex. W. On August 24, 1984, Picozzi filed this lawsuit against the Regents of the University of Michigan, President Shapiro, and Dean Sandalow.

His complaint contains five counts. Count I alleges that defendant deprived plaintiff of liberty and property without due process of law. Count II alleges that defendant violated plaintiff's right to equal protection of the laws by conditioning his re-enrollment on successful completion of a polygraph exam or an administrative hearing. Count III alleges that defendant unconstitutionally conditioned the enjoyment of plaintiff's liberty and property upon plaintiff's waiver of his

privilege against self-incrimination. Count IV summarily alleges that an "ex parte and ultra vires adjudicative mechanism" violated plaintiff's rights to equal protection of the law. Complaint ¶ 122. Count V alleges that defendant breached a contract with plaintiff.[3]

---

3. Although Picozzi charges Sandalow in the complaint's first paragraph with intentional infliction of emotional distress, he does not state this theory in a separate count or cause of action. I must conclude that he does not assert the theory against Sandalow. Even if Picozzi had raised the theory, I would find that the allegations of the complaint fail to support such a cause of action under Michigan law. See Roberts v. Auto-Owners Insurance Company, 422 Mich. 594, 374 N.W.2d 905 (1985). Furthermore, Pennhurst State School and Hospital v. Halderman, 465 U.S. 89, 109 S.Ct. 900, 79 L.Ed.2d 67 (1984), forbids my exercise of pendent jurisdiction to award damages against state officials for violation of state law.

II. PROCEDURAL DUE PROCESS

Picozzi's core claim is that Sandalow denied him procedural due process by detrimentally altering his status at the University without first affording him a hearing. Procedural due process claims require a two-step analysis. First, I must determine whether Sandalow deprived Picozzi of any liberty or property interest. Second, assuming I so find, I must determine whether the deprivation occurred without due process. See Morrissey v. Brewer, 408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484 (1972) ("once it is determined that due process applies, the question remains what process is due."); Benson v. Scott, 734 F.2d 1181, 1184 (7th Cir. 1984), cert. denied, _____ U.S. _____, 105 S.Ct. 435, 83 L.Ed.2d 361 (1984) ("The usual analysis of a due process claim proceeds sequentially.

First, one determines . . . whether a protected property interest exists at all. If such an interest is found, one determines what procedures must be followed. . . ."). In resolving these issues I note that both parties seek Summary Judgment, and that there are no material facts that are controverted.

A. Deprivation of Protected Interest

The first question I must decide is whether Sandalow deprived Picozzi of a protected interest. I hold that he did. The gravamen of Picozzi's claim is that Sandalow altered his good standing at the Law School, making it impossible for him freely to pursue his studies there or at any other accredited law school. Picozzi could not return to his studies at the University of Michigan because of conditions imposed upon his re-enrollment. He could not complete his studies at any other

accredited law school because no such law school would accept him as long as his status at the University of Michigan was less than unqualifiedly good.

A public university student has a protected interest in continuing his studies.[4] See Ewing v. Board of Regents of the University of Michigan, 742 F.2d 913, 915 (6th Cir. 1984), rev'd (other grounds), _____ U.S. _____, 106 S.Ct. 507, 88 L.Ed.2d 523 (1985) ("[A]n implied understanding that a student shall not be arbitrarily dismissed from his university is a property interest. . . ."); Dixon v. Alabama State Board of Education, 294 F.2d 150, 157 (5th Cir. 1961), cert. denied, 368

---

4. Whether the interest is best termed "property" or "liberty" is not material. What is important is that Picozzi has an interest triggering due process.

U.S. 930, 82 S.Ct. 368, 7 L.Ed.2d 193 (1961); Stroller v. College of Medicine, 562 F. Supp 403, 412 (M.D.Pa. 1983), aff'd (without opinion), 727 F.2d 1101 (3d Cir. 1984) ("[A] graduate student has a 'property' interest in continuing his studies."); Hall v. University of Minnesota, 530 F. Supp. 104, 107 (D. Minn. 1982) ("A student's interest in attending a university is a property right protected by due process."). This is as it should be. Education is the key -- or at least the prerequisite -- to many successful careers, including a career in law. See Dixon, 294 F.2d 157. When the government provides professional graduate education, it should do so within the constraints of due process.

Sandalow does not directly contest this point, but he contends vigorously that Picozzi has no protected

interest at stake in this case. He argues that Picozzi has pleaded a protected interest on only a letter of unqualified good standing and not in a general right to continue his studies. He asserts that Picozzi has no protected interest in such a letter. Of course, if Picozzi has not been deprived of a protected interest, no due process concerns arise.

Sandalow's argument construes the complaint too narrowly. Count I does allege a property deprivation in terms of a letter of good standing. Sandalow refused to issue such a letter because he had previously altered Picozzi's status at the Law School by conditioning his re-enrollment. In other words, the controversy over the letter reflected an underlying dispute over Sandalow's action temporarily and preliminarily restricting Picozzi's

ability to continue his studies. Picozzi's allegation that Sandalow's actions "in denying plaintiff a letter of good standing . . . deprived plaintiff of property without due process of law," Complaint ¶ 114, broadly construed, includes not only the controversy over the letter itself, but also the underlying dispute over Picozzi's status at the University.

The cases Sandalow cites to support his argument on this point involve interests dissimilar to the protected interest asserted by Picozzi. Gearhart v. Thorne, 768 F.2d 1072 (9th Cir 1985), Lawrence v. Acree, 665 F.2d 1319 (D.C. Cir. 1981), and Lodico v. United States, 571 F. Supp. 21 (E.D. Mich. 1982) all involve performance evaluations or letters of recommendation. Picozzi has not claimed a protected interest in a letter of

recommendation. He asked only for a letter confirming his good standing at the Law School. Sandalow refused the letter because Picozzi's status was not unqualifiedly good. Sandalow's action in altering Picozzi's status from "good" to something less than that, thus temporarily interfering with his ability to pursue his studies, is ultimately what this lawsuit tests. Cases dealing with performance evaluations and letters of recommendation simply have no relevance.

Before evaluating the adequacy of process employed, I must find not only that Picozzi has a protected interest at stake, but also that Sandalow deprived him of the interest. Although I have already held that there was a deprivation, its precise nature requires some definition.

Mathews v. Eldridge, 424 U.S. 319 (1976), helps define the deprivation in this case. In Mathews, the Court tested Social Security procedures for terminating a person's disability payments. The procedures included an evidentiary hearing prior to final termination of benefits. But the procedures also included a preliminary step permitting termination of benefits without an evidentiary hearing. At the preliminary step, the Court defined a claimant's interest as "the uninterrupted receipt of [disability payments] pending final administrative decision on his claim." Mathews, 424 U.S. at 340. The Court held that a claimant could properly be deprived of this limited interest without a prior evidentiary hearing.

In this case, the deprivation was similarly limited. Sandalow neither

imposed nor sought formal disciplinary sanctions.[5] Neither did he permanently and finally bar plaintiff's access to legal education. He simply placed a temporary and preliminary hurdle in Picozzi's path, pending the outcome of an administrative hearing. He made it clear to Picozzi that the University was ready to move ahead with a hearing at his convenience. See

---

5. Picozzi has variously characterized Sandalow's action as suspension, expulsion, and de facto expulsion. Although I am bound in considering Sandalow's Motion for Summary Judgment to accept Picozzi's factual allegations as true (at least where the allegations are not contradicted by unanswered affidavit), nothing requires me to accept Picozzi's characterization of the factual allegations. No factual allegations support Picozzi's characterization of Sandalow's action. Cf. Prelim. Inj. Trans. at 37 ("[Defendants' counsel]): [W]e are not seeking to discipline Mr. Picozzi by these proceedings. We are seeking to determine whether or not he can be re-enrolled in good standing.").

Complaint, Ex. O. Picozzi resisted the hearing. Even as late as August 30 and 31, 1984, during a hearing on his Motion for Preliminary Injunction, Picozzi continued to oppose a hearing.[6]

Although limited, the deprivation in this case is enough to trigger due process protection. Application of due process does not depend upon the weight of the interest, but upon the nature of the interest. See Goss v. Lopez, 419 U.S. 565, 575-76 (1975); Board of Regents v. Roth, 408 U.S. 564, 570-71 (1972). I have already held that Picozzi had a protected interest in continuing his studies at the University. By burdening this interest, Sandalow triggered due process protections for plaintiff.

---

6. See Preliminary Injunction Transcript at 14-18, 27-29.

B. Adequacy of Process

Although the weight of the protected interest is not relevant in triggering application of due process, it is an important factor in determining the precise procedure due in a particular case. To guide decision of what process is due in a particular case, the Court has articulated broad principles of due process. In general, the decision involves balancing government interests with private interests. Mathews, 424 U.S. at 334. More specifically, the Court stated:

> [I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the

> additional or substitute procedural requirement would entail.

Mathews, 424 U.S. at 334-35. I now apply these principles to this case and hold that defendant fully complied with the requirements of due process.

1. Pre-deprivation Hearing

The first question I must decide is whether Picozzi was entitled to a hearing prior to Sandalow's action depriving him of his interest in continuing his education pending the outcome of a full administrative hearing. I hold that he was not entitled to a hearing prior to deprivation of this limited interest. In Goss, supra, the Court applied procedural due process principles to an analogous, although more severe, situation of formal school discipline. The Court held that high school students facing ten-day suspensions are

ordinarily entitled to some kind of hearing prior to suspension. The Court noted that the hearing required need not involve any more than an informal discussion between the student and the disciplinarian immediately following the incident leading to discipline. Goss, 419 U.S. at 582, 584. Based on this assumption of informality, the Court concluded "that as a general rule notice and hearing should precede removal of the student from school." Goss, 419 U.S. at 582. However, the Court stopped short of rigidly requiring a pre-suspension hearing in all cases. The Court stated:

> We agree with the District Court . . . that there are recurring situations in which prior notice and hearing cannot be insisted upon. Students whose presence poses a continuing danger to persons or property or an ongoing threat of disrupting the academic process may be immediately removed from school. In such cases, the necessary notice and rudimentary

> hearing should follow as soon as practicable, as the District Court indicated.

Goss, 419 U.S. at 582-83.

This case falls squarely within the Goss provision for situations not requiring a pre-suspension hearing.[7] Sandalow's first letter to Picozzi following the fire specifically grounded Sandalow's actions in concern for the safety of the law school community. See Complaint, Ex. N. In an

---

7. Picozzi's counsel conceded this during oral argument on these motions. Counsel stated that under Goss, Sandalow could have legitimately suspended Picozzi without a hearing immediately after the fire. Counsel qualified his concession by arguing that Goss permits suspension without a prior hearing only if a hearing takes place promptly after the suspension. In this case, counsel noted, the hearing took place nearly two years after the fire. I consider Picozzi's timing argument elsewhere in my opinion. See infra pp. 18-19.

earlier memorandum addressed to the law school community, Sandalow addressed a rising anxiety among the community's members over various incidents of violence, including the fire, within the community. See Complaint, Ex. I. Such anxiety disrupts academic calm. This is precisely the situation in which Goss permits suspension without a prior hearing. Cf. Joseph v. St. Charles Parish School Board, 736 F.2d 1036, 1038 n. 2 (5th Cir. 1984) (Construing Goss to permit suspension of a tenured teacher without a pre-suspension hearing where "immediate disciplinary action is necessary to prevent further disruption of the educational process.").

Even if Sandalow had not complied with Goss, I would hold that under Mathews Picozzi received all the process to which he was entitled. This case does not involve formal suspension

or any other school discipline. At stake in this case is a preliminary and temporary interference with Picozzi's interest in continuing his education pending the outcome of an administrative hearing to be held at plaintiff's convenience. See supra pp. 10-12. Although even this limited deprivation might in some cases inevitably delay a student's progress, in this case Picozzi could have promptly accepted Sandalow's offer of a hearing and cleared up his status at the Law School prior to the first date on which he was physically able to return to class,[8] further diminishing the severity of the

---

8. Picozzi was hospitalized until May, 1983, and remained in a body cast until October, 1983. See Prelim. Inj. Trans. at 23. Sandalow first offered Picozzi a hearing by letter dated May 13, 1983. See Complaint, Ex. N.

deprivation. Under Mathews, the weight of the private interest affected is the first factor I must consider in determining the procedural protection required by due process. Because Picozzi's interest in this case is less weighty than the interest at stake in Goss, less procedural protection is due him than was due the plaintiffs in Goss.

Moreover, strong public interests, a second factor in Mathews' balance, supported Sandalow's action. First, he had a duty to protect the security of the law school community. He discharged his duty by conditioning Picozzi's re-enrollment on his clearing up the suspicion that naturally surrounded him as the subject of an unexplained arson fire. Second, Sandalow had a duty not to mislead other schools into thinking Picozzi was in unqualified good standing at the Law

School. If Picozzi's theory of the case prevails, Sandalow could be compelled to certify a student's unqualified good standing, even though the student was subject to suspicion, simply because the school had not yet been able to conduct a formal hearing. Dean Sandalow, and others in his position, must have in such cases the authority to take prompt and reasonable preliminary action that preserves the school's interest without finally and permanently depriving a student of his interest in continuing his education. Cf. Scheuer v. Rhodes, 416 U.S. 232, 246 (1974) ("[O]fficials with a broad range of duties and authority must often act swiftly and firmly at the risk that action deferred will be futile or constitute virtual abdication of office."). This is precisely what his action accomplished in this case.

Neither the specific dictates of Goss nor the general principles of Mathews entitled Picozzi to a hearing prior to Sandalow's action conditioning Picozzi's re-enrollment on his successful completion of a polygraph test or an administrative hearing.

2. Law School Handbook

Picozzi also argues that Sandalow denied him due process by using procedures other than those outlined in the Law School Handbook for "investigating and reporting student conduct bearing upon character and fitness for the practice of law." Complaint, Exhibit H. Although I doubt whether Picozzi has sufficiently pleaded this claim as a due process deprivation (he had pleaded the matter as a contract claim), I will address it only to say that Picozzi's claim, assuming it is properly pleaded, is legally untenable.

Due process is a matter of federal constitutional law; failure to comply with state procedures does not, by itself, violate due process.[9] Board of Curators v. Horowitz, 435 U.S. 78, 92 n.8; Hall v. Medical College of Ohio at Toledo, 742 F.2d 299, 309 (6th Cir. 1984), cert. denied, 105 S. Ct. 796 (1985); Hill v. Trustees of Indiana University, 537 F.2d 248, 252 (7th Cir. 1976); Bates v. Sponberg, 547 F.2d 325 (6th Cir. 1976); Jaksa v. Regents of the University of Michigan, 597 F. Supp. 1245, 1251 (E.D. Mich. 1984).

The only question for me is whether Picozzi received constitutionally adequate notice and hearing. I have already discussed and

---

9. I do not mean to imply a finding that Sandalow violated applicable state or Law School procedures.

passed upon the constitutionally adequacy of the hearing procedure. In addition, I hold that Picozzi received constitutionally adequate notice of the basis for defendant's action. "The fundamental requisite of due process of law is the opportunity to be heard." Grannis v. Ordean, 234 U.S. 385, 394 (1914). Constitutionally adequate notice is that which provides a person with sufficient information to make the eventual hearing meaningful. See Mullane v. Central Hanover Trust Co., 339 U.S. 306, 314 (1950). Already in his first letter to Picozzi, Sandalow made it clear that the purpose of conditioning Picozzi's re-enrollment was to determine his responsibility for the fire. See Complaint, Ex. N ("The information available to us has led me to conclude that I would not be warranted in permitting you to re-enroll

without a close examination of the question whether you are the person responsible for setting the March 8 fire."). This is precisely the question that the 1985 administrative hearing finally adjudicated. Picozzi had official notice of it during May, 1983. Even if Sandalow had not made this perfectly clear by letter, I cannot believe anyone in Picozzi's position could have been unaware of the basis for the Dean's action.

3. Timing of the Administrative Hearing

Finally, Picozzi argues that the administrative hearing ultimately held should have taken place sooner than it did, even if not prior to Sandalow's preliminary action. Picozzi relies upon Goss which permits suspension in some cases without a pre-suspension hearing, but requires in those cases that a hearing follow

suspension "as soon as practicable." Goss, 419 U.S. at 583. Picozzi argues that Sandalow failed to satisfy this requirement. I reject this argument.

First, Sandalow had no duty in this case to satisfy the strictures of Goss. See supra pp. 10-12, 15-16. Second, Picozzi himself is responsible for the delay in the hearing's commencement. In both his first and second letters to Picozzi, Sandalow urged prompt reply. See Complaint, Exs. N, O. In his second letter, Sandalow expressed his hope that the entire matter could be resolved prior to the beginning of 1983 Fall Term. See Complaint, Ex. O. Unfortunately, Picozzi's medical condition prevented such an early disposition of the matter. But even after he recovered, Picozzi -- not Sandalow -- resisted holding a hearing. See Prelim. Inj. Trans. at 14-18,

27-29. Picozzi cannot now complain of the delay he occasioned.

C. Qualified Immunity

Even if Sandalow did violate Picozzi's procedural due process rights, and I hold he did not, I also hold that Sandalow is entitled on the facts of this case to qualified immunity. Qualified immunity seeks to provide state and federal officials, acting reasonably, with the authority to make difficult decisions and to exercise discretion without fear of being held to answer in damages. See Wood v. Strickland, 420 U.S. 308, 319-20 (1975). In the words of the Supreme Court:

> Even defendants who violate constitutional rights enjoy a qualified immunity that protects them from liability for damages unless it is further demonstrated that their conduct was unreasonable under the applicable standard.

Davis v. Scherer, 104 S. Ct. 3012, 3018 (1984). It is now clear that qualified immunity shields officials from damage liability as long as their conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). See also, Davis, 104 S. Ct. at 3018; Windsor v. The Tennessean, 719 F.2d 155, 165 (6th Cir. 1983), cert. denied, 105 S. Ct. 105 (1984).

In this case, Sandalow's action was objectively reasonable because it did not violate a clearly established right of which a reasonable person would have known. Neither Goss, Mathews, nor any other federal law[10] clearly requires a

---

10. Only federal law is relevant to the application of qualified immunity. See Davis, 104 S. Ct. at 3019-21.

hearing prior to the preliminary action Sandalow took in this case. He faced a situation calling for prompt action and requiring reliance on information supplied by other people, precisely the situation in which Wood calls for application of the qualified immunity doctrine. Wood, 420 U.S. at 319, quoting Scheuer, 416 U.S. at 246 ("As with executive officers faced with instances of civil disobedience, school officials, confronted with student behavior causing or threatening disruption, also have an 'obvious need for prompt action, and decisions must be made in reliance on factual information supplied by others.'"). He responded by altering Picozzi's status pending the outcome of a polygraph test, or a full administrative hearing. Even if this action violated Picozzi's constitutional right, Sandalow cannot be held liable

for damages because the right violated was not clearly established at the time he took the action.

III. OTHER MATTERS

A. Equal Protection

Counts II and IV of the complaint allege that Sandalow denied Picozzi equal protection by treating him differently than other students at the University. It is true that Sandalow conditioned the re-enrollment rights of Picozzi only. But he rightfully treated Picozzi differently than other students because Picozzi was not similarly situated with any other student. The unexplained arson fire took place in Picozzi's room, and no one else's room. No other student was seen near Picozzi's room at the time of the fire. In fact, the Ann Arbor Police Department informed Sandalow that they considered Picozzi the primary, if not the only, suspect.

See Sandalow Affidavit ¶ 4. These factors provided a rational basis for his action with respect to Picozzi. Since Picozzi is not alleging denial of a fundamental right or a classification based on suspect class lines, this is all equal protection requires. See, e.g., Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256, 271-73.

B. Self-Incrimination

Picozzi alleges in Count III that Sandalow deprived him of his privilege against self-incrimination. Although the complaint does not articulate a theory for this cause of action, he argues in his brief that Sandalow deprived him of his privilege by asking him to submit to a polygraph test. In Picozzi's words:

> This request imposed an unconstitutional choice upon Mr. Picozzi. He either had to waive his right to silence . . . or he

> had to request an administrative hearing at which his failure to take the examination was to be considered substantive evidence of his guilt.

Plaintiff's Brief at 20. I hold that Picozzi was not deprived of his privilege against self-incrimination by Sandalow's request that plaintiff take a polygraph test.

Sandalow never conditioned Picozzi's re-enrollment rights on a polygraph test. He presented the polygraph test to Picozzi as an option to accept or reject. In fact, if Picozzi submitted to a polygraph test and failed, Sandalow would still have permitted him to go through an administrative hearing. See Complaint, Ex. Q ("If, however, you decide against taking the examination or if you fail to pass it, a hearing would be necessary to determine your eligibility to re-enroll."). That Picozzi's refusal

to take the test might be used at the administrative hearing as evidence that he set the fire does not threaten his privilege. In the first place, the refusal would have virtually no probative value because Sandalow gave him the option of a polygraph or a hearing. I do not think this point would escape the attention of a qualified hearing officer. Furthermore, even though a person may assert the privilege against self-incrimination during a civil proceeding, the privilege protects a person from only criminal exposure. See, e.g., Kastigar v. United States, 406 U.S. 441, 444 (1972). The administrative hearing was a civil proceeding.

C. Contract

Count V of Picozzi's complaint alleges that he entered into a contract

with the University upon enrollment at the Law School, and that the terms of this contract were contained in the Law School Handbook. He alleges that Sandalow breached this contract by failing to use the disciplinary procedures contained in the handbook. I reject this claim because I hold as a matter of law that Picozzi never entered into a contract to be governed by the procedures contained in the Law School Handbook. Even if he did enter into such a contract, I hold that Sandalow did not breach it in the manner alleged because Sandalow never sought to discipline Picozzi. Furthermore, Pennhurst, supra, forbids me from exercising pendent jurisdiction over a state law claim against state officials for the purpose of ordering state officials to comply with state law, or

of assessing damages against state officials for violation of state law.[11]

D. Defendant Shapiro

Plaintiff's counsel stated before me on the record that he was retaining defendant Shapiro solely to preserve a motion for § 1988 attorney fees arising out of the Preliminary Injunction hearing and the administrative hearing. Although Picozzi has not presented the Court with a formal motion for fees, I sua sponte consider the matter now.

Under 42 U.S.C. § 1988, attorney fees are available to civil rights claimants. But no such fees may

---

11. Pennhurst's rationale does not forbid me from exercising pendent jurisdiction to rule that state officials complied with state law. Such a ruling by a federal court is not an "intrusion or state sovereignty." Pennhurst, 465 U.S. at 106.

be awarded unless I find the party seeking fees to be a prevailing party. I hold that Picozzi was not a prevailing party at the Preliminary Injunction hearing. He wanted me to order defendants to issue an unqualified letter of good standing on his behalf. I did not enter such an order. Instead, the parties agreed after two mornings of discussion to conduct an administrative hearing to determine Picozzi's responsibility for the fire. Although defendants pressed for the hearing, Picozzi initially resisted it. As is evident from the transcript of the hearing, Picozzi was not a prevailing party. Accordingly, he is not entitled to § 1988 fees for the Preliminary Injunction hearing.

Picozzi did prevail at the administrative hearing conducted pursuant to the parties' agreement. But

that outcome, although important to him, does not make him the prevailing party on his underlying civil rights cause of action. On the contrary, I have just held that his civil rights were not violated. Accordingly, the administrative hearing cannot support § 1988 fees.[12]

There being no reason for Shapiro to remain a defendant in this case, I order that he be dismissed with prejudice.

IV. DISPOSITION

For the reasons given in this opinion, defendant Sandalow's Motion for Summary Judgment is GRANTED on all

---

12. Even if Picozzi were a prevailing party for purposes of § 1988, I would exercise my statutory discretion to deny an award of attorney fees in this case.

counts, and plaintiff Picozzi's Motion for Partial Summary Judgment is DENIED on all counts. In addition, defendants Shapiro and Board of Regents are DISMISSED with prejudice.

IT IS SO ORDERED.

_____

John Feikens
Chief United States
District Judge

Dated:

86-1136

UNITED STATED COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JAMES M PICOZZI,	:
Plaintiff-Appellant,	:
v.	: ON APPEAL FROM THE UNITED STATES DISTRICT COURT
TERENCE SANDALOW, individually and in his official capacity as Dean of the University of Michigan Law School; HAROLD SHAPIRO: BOARD OF REGENTS, UNIVERSITY OF MICHIGAN,	: FOR THE EASTERN DISTRICT OF MICHIGAN
Defendants-Appellees.	:

BEFORE: KEITH and MORRIS, Circuit Judges; and GIBBONS[13], District Judge.

PER CURIAM: Appellant James Picozzi appeals the district court's decision

---

13. Honorable Julia S. Gibbons, United States District Court for the Western District of Tennessee, sitting by designation.

granting summary judgment in favor of appellee Terence Sandalow and dismissing his claims against appellees Harold Shapiro and the Board of Regents of the University of Michigan. After a thorough review of the briefs, record and oral argument in this appeal, we AFFIRM the district court based on the well-reasoned opinion of the Honorable John Feikens, United States Court for the Eastern District of Michigan.

ISSUED AS MANDATE:
September 21, 1987

COSTS: APPELLEES TO RECOVER
Printing costs (Univ. of Mi. - $143.50)
Printing costs (Sandalow - $156.80)

May 13, 1983

Mr. James M. Picozzi
616 Sewickley Heights Drive
Sewickley Heights Manor Drive Condo
Sewickley Heights, Pennsylvania 15143

Dear Mr. Picozzi:

I was pleased to learn from Professor Barker that your recovery is progressing well.

As you know, no criminal charges have as yet been filed in connection with the fire that was set in your room in the early morning hours on March 8. Whether or not such charges are ever filed, the Law School and the University have an independent interest in determining the identity of the person responsible, especially because the continuing presence of that individual within the community would create a serious risk to its members.

In this connection, I have been informed that the Ann Arbor police have requested that you take a polygraph test and that your father has indicated that you would be willing to do so. I am writing to notify you that if you do take a polygraph test administered or arranged by the Ann Arbor police and if that test indicates that you are not responsible for the March 8 fire, you would of course be permitted to return to the Law School in the fall term.

With regret, I must also inform you that unless you take a polygraph test, an administrative proceeding will be

required to determine whether you will be permitted to re-enroll as a student. The information available to us has led me to conclude that I would not be warranted in permitting you to re-enroll without a close examination of the question whether you are the person responsible for setting the March 8 fire.

The necessity for such a proceeding would, of course, be obviated if you were to take and pass a polygraph test, and I of course hope that you will pursue that course. I would appreciate it if you would notify me of your plans within the next several weeks.

Sincerely,

Terrance Sandalow
Dean

TS:lf

August 23, 1985

To Whom It May Concern:

James M. Picozzi is a student in good standing at the University of Michigan Law School and is eligible to return.

Susan M. Eklund
Associate Dean

SME:lf

Hearing to Show Cause Why Preliminary
Injunction Should Not Issue
August 30, 1984

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
August 30, 1984 -- 9:00 A.M.

JAMES M. PICOZZI

Plaintiff,

-against-

TERRANCE SANDALOW, Individually and in his Official Capacity as Dean of the University of Michigan Law School; HAROLD SHAPIRO, Individually and in his Official Capacity as President of the University of Michigan; and the Board of Regents of the University of Michigan,

Defendants.

APPEARANCES:

MARK B. GOMBINER, ESQ.
RONALD L. KUBY, ESQ.
Attorneys for Plaintiff

PETER A. DAVIS, ESQ.
Attorney for Defendants

MR. GOMBINER: I would like to explore this and get further information from counsel for the other side. If there was to be an administrative hearing, would they stipulate that the administrative hearing would be in accordance with the University of Michigan Handbook?

MR. DAVIS: Well, the rules and regulations attached to the Complaint do not apply to this kind of situation. That's one of the problems that we have with their Complaint. It is that they attached this detailed procedure, somewhat cumbersome procedure which was never intended to apply to this kind of case. It was intended to apply to different infractions in the University.

There is no procedure in place as to how the hearing should be conducted. Dean Ecklund, who will testify at length as to the kind of procedure that they

are referring to that would be utilized for this kind of hearing.

THE COURT: Do I take from the response, Mr. Davis, that the hearing that you are referring to that would be held would be less cumbersome, less intricate but there would be given to Mr. Picozzi a full opportunity to give his side of it?

MR. DAVIS: Absolutely, and I would hope I can work out the terms with counsel. It depends a lot on the availability of witnesses or whether they are willing to stipulate to the police report, and so forth, which contains a lot of hearsay.

MR. GOMBINER: We do not stipulate that the rules and regulations [do not] apply to this kind of proceeding. We think they do apply to this sort of incident.

Secondly, what Mr. Davis is suggesting here is that the more serious the offense, the less due process.

* * *

MR. GOMBINER: The position secondly, if there is to be an administrative proceeding, that he is entitled, one, to an administrative proceeding in accordance with the rules and regulations that have been set forth in the University of Michigan handbook; and two, that he is entitled to be formally charged with some offense -- and one of the essential elements of the due process is certainly notice, and that he has not, in fact, received adequate notice. He has not been charged with anything. He is being switched around. He is being asked: "Even though you haven't been charged

with anything, you have to come forth and clear your name," which also suggests that he has to sustain the burden, that he has the burden of proving he didn't do something when he hasn't been charged with anything. So, we don't want to do that.

* * *

THE COURT: No, right now. Is it your position that he will submit to an administrative hearing as provided for in the regulations?

Yes or no?

MR. GOMBINER: Judge -- yes, Judge.

THE COURT: Well, you can't have it both ways.

MR. GOMBINER: Well, he would submit to a procedure as provided for in the University rules and regulations. And I would call to the Court's attention that

part of the procedure is that he be formally charged.

THE COURT: No, no. I didn't ask you to --

MR. GOMBINER: Well, that is part of the procedure.

THE COURT: Well, I don't know what the regulations say, but if you start to engraft --

MR. GOMBINER: Judge, Mr. Picozzi would have always been delighted if the University of Michigan had complied with their own rules and regulations.

* * *

Hearing to Show Cause Why Preliminary
Injunction Should Not Issue
August 31, 1984

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
August 31, 1984 -- 9:00 A.M.

JAMES M. PICOZZI,

Plaintiff,

-against-

TERRANCE SANDALOW, Individually and in his Official Capacity as Dean of the University of Michigan Law School; HAROLD SHAPIRO, Individually and in his Official Capacity as President of the University of Michigan; and the Board of Regents of the University of Michigan,

Defendants.

APPEARANCES:

MARK B. GOMBINER, ESQ.
RONALD L. KUBY, ESQ.
Attorneys for Plaintiff

PETER A. DAVIS, ESQ.
Attorney for Defendants

THE COURT: Tell me right now: will you have a hearing under the regulations without any ifs and, or buts?

MR. GOMBINER: Without any ifs, ands, or buts, we are willing to have a hearing, without any qualms about that.

THE COURT: What is Mr. Ruby saying?

MR. GOMBINER: Judge, the disagreement is on their part.

THE COURT: Mr. Davis, will you apply the rules and regulations?

MR. DAVIS: Part of the rules and regulations have no applicability at all because it does not call for the Defendant to be able to buy his way out of it.

Your honor, I think the Defendants have been sandbagged because there was a time when all students were on campus, we could have had the hearing under those rules, even though they contended that the rules did not apply. Now, it is different.

THE COURT: You always said that he was entitled to an administrative hearing.

MR. DAVIS: Dean Sandalow had a hearing which would give him his due process rights. This hearing is cumbersome.

THE COURT: Why don't you say right here on this record what kind of administrative hearing it will be, and Mr. Gombiner can say yes or no.

MR. DAVIS: Can I have five minutes to talk to Dean Sandalow?

THE COURT: Yes, but we will stay in session.

(Discussion off the record.)

Summary Judgment Hearing

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
November 12, 1985 -- 2:00 P.M.

JAMES M. PICOZZI

Plaintiff,

-against-

TERRANCE SANDALOW, Individually and in his Official Capacity as Dean of the University of Michigan Law School; HAROLD SHAPIRO, Individually and in his Official Capacity as President of the University of Michigan; and the Board of Regents of the University of Michigan,

Defendants.

APPEARANCES:

MARK B. GOMBINER, Esq., appearing on behalf of the Plaintiff.

THEODORE SACHS, Esq., and PETER A. DAVIS, Esq., appearing on behalf of the Defendants.

THE COURT: So, you do say there can be circumstances for the immediate removal from school, if there is a threat or the interruption of the academic process or posing a danger to persons and property?

MR. GOMBINER: Your Honor, I cited a number of cases, Prysbylowitz v. Newman (sp), Gardenheier v. Chalmers (sp), Strickland v. Board of Regents.

THE COURT: My question is this: If that is what Goss means, what would you call that? Would you call it expulsion, suspension?

MR. GOMBINER: I call that suspension.

THE COURT: But it wouldn't be an unlawful suspension would it?

MR. GOMBINER: No, just suspension.

THE COURT: It would not be unlawful, would it?

MR. GOMBINER: No, it wouldn't.

It would be unlawful, as Goss points out, and numerous other cases point out -- if they did that and not, very quickly, give adequate notice of a hearing.

This is the specific holding of Goss v. Lopez, and the specific holding of many other cases. They couldn't do that and say: "Well, he is not in school." Then they are under a particular obligation under Goss v. Lopez to quickly provide adequate notice and hearing.

THE COURT: I have no further questions.